IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

FOREST E. LEVERS, Administrator, etc., *Petitioner,*

v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit, *Respondent.*

BRIEF IN SUPPORT THEREOF.

I.

THE DECISION OF THE LOWER COURT SUBORDINATES THE LIQUOR LAWS OF THE STATE OF NEW MEXICO TO THOSE OF THE FEDERAL ALCOHOL ADMINISTRATION ACT WHEREIN INTRA-STATE COMMERCE IS INVOLVED, AND IS IN CONFLICT WITH THE LANGUAGE AND POLICY EXPRESSED IN THE UNITED STATES v. FRANKFORT DISTILLERIES, INC., 234 U. S. 293.

The question of law raised here is so intermingled with the facts that restatement to some extent is necessary.

Petitioner was doing a wholesale liquor business within the State of New Mexico and had receiving and distributing depots at Roswell and Hobbs, New Mexico. Both places were under New Mexico licenses (Exhibit 154, Tr. 366). Petitioner bought the commodities from producers outside

of the State as there were no producers in New Mexico. They were shipped by the producers across the State line and came to rest at either depot. From there they were sold and distributed by petitioner to retailers within the State. All matters involved in this case relate solely to *retail* sales.

The partnership was dissolved by the death of Ray Levers on October 1, 1941. Petitioner and Oran C. Dale were then appointed co-administrators by the Probate Court of Chaves County, New Mexico and "*directed and empowered to continue the business known as Levers Brothers in the ordinary manner, to purchase necessary merchandise, or equipment, and to disburse funds from the said partnership account . . .*" and were ordered to keep "*accurate records of all accounts for submission to and approval*" of that Court.

Up to this time, and for approximately twenty years previous, excluding the prohibition era, the partnership had been doing liquor business within the State. From 1935 they had a Federal wholesale liquor license.

When the State Court appointed the co-administrators, they inquired of the Federal Alcohol Administration, sometimes herein called FAA, as to the securing of a new license because of the change in the management, and the FAA thereupon forwarded application papers for execution by the co-administrators. These papers were filled out and executed, and the co-administrators were granted a wholesaler's permit No. 13-P-37 on December 26, 1941.

At the time of making application for administration in the Probate Court, and prior thereto, there existed a very complete and detailed State liquor law to which petitioner had responded by applying for and being granted, after investigation by State officials, two contemporaneous State licenses. (For Extracts therefrom believed pertinent, see Appendix C herein.)

The State laws comprehended complete procedure for and surveillance of all the acts of petitioner, both as to the

partnership and as to their successors, the co-administrators of the Court.

The State has made no protest nor brought any action to annul the permit granted to an officer of one of its courts. On the contrary, from the time that the state court took jurisdiction of the business in question on October 7, 1941, it has had petitioner under a $25,000 bond to carry on the business and to make regular reports to it.

Under these circumstances, has the Lower Court the right to say to petitioner that the FAA may refuse to permit liquors to cross the State line on behalf of petitioner and when the commodity has come to rest administrator cannot distribute it intra-state? Has the Court the right to say in substance, "You have asked the FAA for a license, but you cannot have one even though you are under the process of the State Court, because the FAA believes that Ray Levers, a partner, now dead, and you, a private individual, made some misrepresentations upon which you secured a permit in 1935." Or can the Circuit Court of Appeals say, when two co-administrators of the State Court ask for permit No. 13-P-37, and it was granted, that it can be annulled because of alleged acts preceding the appointment of these co-administrators?

Finally, can the FAA and the Lower Court say to the administrator, despite the fact that the same parties are not before them and that there is a State Law covering all questions of sale and distribution intra-state and that a State Court is supervising all this business, "We are going to stop you from selling in the State by refusing to give you a Federal permit which would be the only means of your obtaining goods outside of the State, simply because we believe that your predecessors in business made a misrepresentation with respect to ~~five or six~~ seven retail outlets in the State where there are approximately 860"?

What the Lower Court has said in substance is: "We sustain the annulment of the Federal permit and the refusal to grant new ones on three grounds, (1) "it makes no difference whether there is a State law" we do not think

that the State law should prevail in this case, (2) nor do we think that the fact that a State Court, under a State law, has entire control of the sale and distribution of petitioner's commodities in the State makes any difference; (3) We think that interstate commerce is affected substantially because of the alleged acts of petitioner's predecessor in control of the business" *might* affect the business of other producers outside of the State from getting their share of the business within the State, and (4) we think "the business that *might* be taken away from competitors outside of the State is substantial."

With respect to the domination of the FAA over the State Law and its enforcement, the Circuit Court of Appeals has referred to United States v. Frankfort Distilleries, Inc., and two other cases. An examination of the Frankfort case shows that it is based on facts entirely different from those in the instant case. In it, the contention arose over the attempt of a group of liquor interests outside of the State of Colorado, in conspiracy and combination, attempting to maintain intra-state prices within the State, in violation of the Sherman Anti-Trust Act, with the effect of restraining interstate commerce. Therefore it does not apply as far as interstate commerce is concerned.

However it is to be noted that in the Frankfort case, the Court declared that since the Twenty-first Amendment to the Constitution was enacted there has been a fundamental change as to the control of liquor traffic in the State, and that because of the Twenty-first Amendment, the power of the State to control the traffic in liquor within its borders is paramount.

Finally, should not all matters relating to the *retail* sale of liquors within the State of New Mexico be left to regulation by and through the comprehensive laws of that State upon the subject?

Concluding upon the subject under this heading, it is obvious that the Circuit Court of Appeals and the supervisor have subordinated the liquor laws of New Mexico to

those of the FAA where intra-state commerce is actually involved, and in doing so, have taken a position in conflict with the opinion in United States v. Frankfort Distilleries, Inc.

II.

THE DECISION OF THE LOWER COURT ASSUMES AND BASES ITS OPINION UPON "A DIRECT TOUCH" OR DIRECT EFFECT ON INTERSTATE COMMERCE, WHEN THE EVIDENCE SHOWS THAT THERE WAS NO SUCH DIRECT TOUCH OR EFFECT.

The lower Court's opinion asserts under Section 5 (a) and (b) of the Act on the subjects of "Exclusive Outlet" and "Tied Houses," where there were only seven retail establishments in New Mexico, involved, that the sales were made to the exclusion of the commodities sold "*by other persons in interstate or foreign commerce.*"

On this subject, the Court's opinion said,

> "Obviously, if one wholesaler in New Mexico so dominates a substantial number of retail dealers that such retail dealers are compelled to purchase substantially all of their distilled spirits from such wholesaler, such practices will restrain and prevent transactions in such distilled spirits between other wholesalers in the State of New Mexico and distillers and distributors in other states."

The Court continues to say,

> "Moreover, it is not to be doubted that, in many instances, distilled spirits procured outside the state of New Mexico by wholesalers to fill prior orders of retail dealers are delivered to such retail dealers *with only a temporary pause at the warehouse of the wholesaler which interrupts,* but does not terminate, the interstate journey of the goods. In such a situation there is a practical continuity of movement from the distiller or distributor without the state to the retailer within the state of New Mexico. The practices engaged in by Levers Brothers and Forest E. Levers would restrain such transactions in interstate commerce."

The statement upon which the Court bases its opinion is not founded upon the record. It may be possible to assume a series of events where interstate commerce might be substantially affected within the State and bring the situation within the Federal Alcohol Administration Act. But the facts were here as follows.

There were no manufacturers or producers within the State. Therefore, all commodities had to be brought from without the State. Hence there would not be any interference between one wholesale distributor and another within the State, because of any liquors produced within the State.

As to those brought from without the State, there is no evidence or charge whatsoever that there was a conspiracy, outside the State, to interfere with such products crossing the State line. In fact, the Court should note that there was no charge here of a violation of interstate commerce before the supervisor. There was only the charge of making misleading statements with respect to retailers (standard Liquor Stores, Inc., and its seven distributors were retailers) within the State. They were purchasing goods that had come to rest within the State, and there were only five of them involved out of approximately 860 retailers in the State.

It is respectfully submitted that the word "substantial" is not supported when the claim is thus limited to only seven retailers. (See Official List of Licensed Liquor Dealers of the State of New Mexico.)

The documents which the Supervisor introduced in evidence (Exhibit 154, Tr. 366) show that the commodities came to rest, at either the Roswell or the Hobbs branch of petitioner, in New Mexico. The goods were then "sold at the Hobbs branch" or "the Roswell branch where the Government forms are maintained and entries thereto made." Hence the opinion of the Lower Court, where it supposes that the commodities are bought by petitioner "with only a temporary pause at the warehouse of the wholesaler," is not founded upon the record and there is no interstate commerce involved, since the charge of misleading begins only

after the commodity is to be distributed from the two branches, when the business is all intra-state.

If the Court's supposititious case does not stand up, then its conclusion, that the practices engaged in by Levers Brothers and Forest E. Levers would restrain such transactions in interstate commerce, becomes mere dicta.

Moreover, the fact that only intra-state business is involved is further demonstrated by the fact that all transactions of petitioner were supervised and controlled and under the order of a State Court having jurisdiction over the property.

Finally, the Court's conclusion that there were a substantial number of retailers affected can hardly be sustained, when only seven are claimed to have been interfered with, and the record shows that all of those seven were being sold to under State licenses, and that they were only an infinitesimal part of retail outlets of the State.

III.

THE EXTREME SEVERITY OF PENALTIES ABOUT TO BE INFLICTED BY THE SUPERVISOR BEAR NO RELATION TO PENALTIES INFLICTED IN OTHER CASES OF A LIKE CHARACTER, AND THE ACTION OF THE SUPERVISOR, CONSIDERING THE LACK OF GRAVITY OF OFFENSE CHARGED, IS ARBITRARY AND CAPRICIOUS AND PETITIONER WILL, IN EFFECT, HAVE BEEN DENIED DUE PROCESS OF LAW, IF THEY ARE ENFORCED.

There is no dispute that if the penalties about to be enforced on petitioner are exacted, a large and going business will be extinguished.

Under certain circumstances such a drastic penalty might be justified. For example, if the parties who obtained a permit were found to be criminals who had been convicted under Federal or State law; or were notorious bootleggers; or there was a corporation whose president and chief stock-

holder, in control of a company, had violated the law, been convicted and then the president had sold his stock and control of the company to other notoriously many-times convicted parties, so that the control of the company passed from one group of crooks to another group of crooks, the supervisor would in such cases be justified in annulling the permit and refusing new ones. This would not be arbitrary or capricious, because it would be dangerous to have people with criminal records in charge of liquor business.

Let us contrast the facts in the instant case. Neither Mr. Levers nor his deceased brother, Ray Levers, had ever been convicted of a felony or a misdemeanor either under a Federal or a State law. Nor had any permit of theirs been suspended or revoked for violation of the Federal Alcohol Administration Act. Nor had the parties been charged with the violation of the liquor laws of the State of New Mexico or their licenses thereunder revoked, though they had been in the business for twenty years.

Now a sudden complete change of position occurs. Ray Levers dies. His brother and his widow apply to the Probate Court of Chaves County, New Mexico for administration of the estate and the business of Mr. Ray E. Levers. The Court grants the petition and after hearing appoints Mr. Forest E. Levers and Mr. Oran C. Dale as co-administrators, orders them to conduct the business under its supervision, requires each of them to put up a bond of $25,000 for conducting the business properly and orders them to report regularly to the Court as to the conduct of the business.

All of these facts, the record shows, were known to the Federal Supervisor, as well as to the State Officials supervising this particular liquor business. In addition to this, there existed a complete State law covering all the actions of petitioner under which he was required to take out licenses, and did; and under which he was to respond by report regularly, and did.

In addition, the complaint here is not of being criminals and lying about it, or doing criminal acts, but merely attempting to make "exclusive sales" to seven retail outlets, or to apply what is known as "Tied House" restrictions to them, all of which could have been handled under the State law, and if necessary, by application to the State Court.

We respectfully suggest that if the circumstances are as we have said above, that the thing to do would, in the event that the Federal Supervisor thought there were violations by way of exclusive sales or "Tied House" contracts, have been to bring this matter to the attention of the Court and had petitioner removed as an administrator. But instead of this, the Supervisor, now sustained by the Lower Court, has gone to extreme limits, the like of which do not appear in any case that we have examined, and he is about to punish this official of a Court with a punishment so condign that it will annihilate the business of an estate as well as a business that is under the surveillance of a State Court.

We know of no similar case where there has been a punishment inflicted of more than a suspension. In annulling the existing permit and refusing to grant applications for other permits, is under the circumstances arbitrary and capricious.

Furthermore, in view of the fact that the whole situation is under the State law, and within the State Court, and petitioner cannot secure any of his products if this order is carried out, he is being denied due process of law. This drastic "death sentence" is surely not warranted by the circumstances of this case. It is an abuse of administrative discretion and power.

In order that this Court may have the benefit of a comparison of the punishments inflicted in other cases involving liquor transactions with that in the instant case, petitioner has made an analysis and contrasted them in Appendix A of this brief. Petitioner urgently asks this Court to review the cases in this Appendix.

IV.

THE CIRCUIT COURT OF APPEALS FAILED TO GIVE DUE CONSIDERATION AND EFFECT TO THE FACT THAT THE CONDUCT OF THE ENTIRE BUSINESS OF PETITIONER WAS UNDER THE DIRECTION AND CONTROL OF A STATE COURT AND STATE LAWS.

The State of New Mexico has enacted an exhaustive Intoxicating Liquors Act that covers all the matters presented in the sale and distribution of liquors by petitioner (Intoxicating Liquors Act of New Mexico, Chapter 61, pp. 105-1026, New Mexico Statutes, 1941).

The Alcohol Administrator, in the hearing before the official representing him, sought to establish an alleged continuing practice of exclusive outlet and "Tied House" agreements or enforcements without giving any consideration to this Law or the acts of the State Courts.

After Ray Levers had died and the partnership dissolved, and when the jurisdiction of the Probate and other State Courts had been invoked for carrying on the business of the petitioner and for its protection, respondent sought to show that there was still a continuing practice of exclusion and restraint by petitioner. However, the Probate Court did have jurisdiction of the business of the *partnership* assets and estate, according to the record, and it was under its orders that petitioner proceeded when he asked for Permit No. 13-P-37.

In addition to the jurisdiction of the Probate Court, petitioner has set forth, under Appendix C of this brief, some of the essential paragraphs of the New Mexico Liquor Law. For example, no wholesaler could sell alcoholic liquors to any person other than the holder of a New Mexico wholesaler's, retailer's, dispenser's or club license. Nor could a person receive a license from the State who had been convicted of a felony or convicted of two separate misdemeanor violations of the State liquor act in any cal-

endar year nor could a wholesaler sell or ship alcoholic liquors *not received at, and shipped from,* the premises specified in such wholesale license, except beer, as provided in Section 705. In other words, *imported liquors had to come to a rest in the State before they could be put out for sale or distribution in retail.*

If a person desired to quit business or if a licensee died, the stock of liquors could be sold to any other retailer, dispenser or club, or to any New Mexico wholesaler, *without the seller thereof incurring any criminal or civil liability* under the provisions of this Act (Laws, 1939, Chapter 236, Section 1501, p. 566). A repossession of any stock of alcoholic liquors by a licensed New Mexico wholesale liquor dealer, or the repossession of any alcoholic liquors from any New Mexico wholesale liquor dealer is not a violation of the said New Mexico Laws.

Finally, the law states that under certain conditions (Chapter 61, p. 911 (C) (4)) spirituous liquors, beer or wine could be sold by any officer under the order or direction of Court and not be a violation of the New Mexico Statutes.

In the instant case, the Court will observe from the record that after the State Court took over the supervision of the aforesaid liquor business the Standard Liquor Stores, Inc., was dissolved on September 25, 1943 (Tr. 332, 442, Exhibit 51—d). This is the retail liquor store which respondent asserted petitioner controlled, and which in turn controlled the aforesaid outlets.

It is respectfully submitted that the various business transactions between the Standard Liquor Stores, Inc. and its outlets, or between the petitioner and said Standard Liquor Stores, Inc., or its outlets, after the death of Ray Levers as indicated in Exhibits 112 to 137 (Tr. 341) were not violations under the New Mexico Liquor Law (Appendix C herein); that these transactions were initiated prior to the appointment and qualifications of petitioner by the

Probate Court and under the said provisions of the New Mexico Law.

From the time of petitioner's appointment it is submitted the Probate Court had complete jurisdiction over the acts of the petitioner.

Under these circumstances it is respectfully suggested that the Circuit Court of Appeals has not given due consideration to the fact that the entire business in question was under the direction and control of a State Court and State laws.

Respectfully submitted,

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